



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 23, 1998

Ms. Mary Keller  
Senior Associate Commissioner  
Legal and Compliance  
Texas Department of Insurance  
333 Guadalupe Street  
Austin, Texas 78714-9104

OR98-2286

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118238.

The Department of Insurance (the "department") received a request for a "copy of the winning [Special Deputy Receiver] Bid Proposal" for the Professional Benefits Insurance Company [PBIC] as well as a list of the three finalists in the selection process. *See generally* Ins.Code art. 21.28, § 2 (commissioner of insurance, as receiver for insurance company placed in receivership, may appoint special deputy receiver through bidding process). You say you have so far released only the requested list of finalists.

The Resolution Oversight Corporation ("ROC"), which submitted the requested winning bid proposal, has objected to the public release of its proposal, arguing that it is excepted from disclosure by Government Code section 552.110, which protects "a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or by judicial decision." *See Id.* sec. 552.305(b) (third party whose interests are involved may submit to Attorney General objections to release of information).

Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the

competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

We note that you call our attention to the following provision in the department's bid solicitation for the PBIC special deputy receiver bids:

Disclosure of Bid Proposal: The Receiver reserves the right to reproduce and disseminate all or portions of any proposals to this solicitation at his discretion, or as provided by law. All proposals become the property of the receiver.

SDR Bid Solicitation for Professional Benefits Insurance Company, Part I, Section II(C)(15).

Although we understand you to ask our opinion as to the validity and effect of this provision, we do not address these issues in this decision. Based on our review of ROC's arguments, we conclude that it has not established even a *prima facie* case for exception under the trade secret aspect of section 552.110. Nor do we find, with regard to its claim that some of the requested information constitutes commercial or financial information protected by the second prong of section 552.110, that ROC has shown by specific factual or evidentiary material that it actually faces competition and that substantial competitive injury would likely result from disclosure. *See* Open Records Decision No. 639 (1996). Accordingly the requested information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

WMW/ch

Ref: ID# 118238

Enclosures: Submitted documents

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